IN THE

SUPREME COURT OF THE UNITED STATES

No. 75 - 6686, 1976 Term

JAMES DOUGLAS HARRILL,

PETITIONER,

V.

NORTH CAROLINA,

RESPONDENT

* *

On Writ of Certiorari

To the Supreme Court of North Carolina

* *

PETITION FOR WRIT OF CERTIORARI

* *

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1976

No. _____

James Douglas Harrill,

Petitioner,

V.

North Carolina,

Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF NORTH CAROLINA

* *

The Petitioner, James Douglas Harrill, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of North Carolina, filed in this cause on January 29, 1976, and issued March 10, 1976.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 N. C. 186, and _____ S. E. 2d ____ (1976). A copy of this opinion is appended to this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was filed in this cause on January 29, 1976, and issued March 10, 1976. The jurisdiction of this Court is invoked under 28 U. S. C. A., 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law whish shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statute 14-17, Vol. 1B, 1975 Supplement, Page 198:

Murder in the first and second degree defined; punishment.-- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

QUESTIONS PRESENTED

1. Was the petitioner denied his constitutional right to trial by due process of law by reason of the conduct of the trial judge during the trial and in settling the case on appeal?

2. Was the sentence of death imposed upon the petitioner unconstitutional?

STATEMENT OF THE CASE

This procedure arises in the Supreme Court of North Carolina.

Petitioner was charged with first degree murder in a bill of indictment and was tried and convicted and sentenced to death in the Rutherford County Superior Court on May 16, 1975. The case was appealed to the North Carolina Supreme Court, which affirmed the petitioner's conviction and sentence in an opinion filed on January 29, 1976, and issued on March 10, 1976.

During the petitioner's trial, the trial judge in a conference with petitioner's court-appointed counsel and the district attorney, informed counsel that in his opinion, the issues would be guilty of first degree murder or not guilty. Thereafter, at the close of the trial and after having argued the case to the jury, counsel for the petitioner first learned that on the previous day, during the course of the trial, the trial judge had informed the district attorney that he intended to charge the jury as to murder in the second degree as well as murder in the first degree. Thereafter, the jury returned a verdict of guilty of murder in the first degree and a sentence of death was imposed by the Court, to which sentence, petitioner excepted and appealed.

Attorneys for petitioner thereafter prepared the proposed case on appeal pursuant to the North Carolina Rules of appellate procedures and served said case on appeal upon the district attorney. The district attorney excepted to portions of petitioner's case on appeal, including the portion of petitioner's case on appeal which took exception to the conduct of the trial judge in imparting information to the district attorney during the trial which was not imparted to counsel for petitioner. That thereafter the trial judge, in a highly irregular manner, set a hearing to determine the case on appeal, at which time the trial judge was extremely abusive and threatening towards the counsel for the petitioner and thereafter entered an Order settling the case on appeal and struck out petitioner's exceptions to the conduct of the trial judge in imparting information to the district attorney which was not imparted to counsel for the petitioner.

That thereafter petitioner's counsel prepared a motion for certiorari to the Supreme Court of North Carolina, setting forth the circumstances and facts in regard to the elimination from the record on appeal of petitioner's exception to the trial judge's conduct and requesting the Court to reinstate said material in the case on appeal on several grounds, including the ground that the conduct of the trial judge denied petitioner his right of due process. That thereafter, the Attorney General of North Carolina filed an answer to the petitioner's petition for writ of certiorari, which answer did not deny any of the factual allegations contained in petitioner's petition, but merely requested the Supreme Court of North Carolina to deny said petition. That by Order entered October 7, 1975, said petition for writ of certiorari was denied by the Supreme Court of North Carolina without comment and without written opinion, and that thereafter the petitioner's sentence and conviction was affirmed by the Supreme Court of North Carolina as aforesaid.

ARGUMENT

The decision below should be reviewed because petitioner was not afforded due process and his constitutional rights were violated. As a result of the action of the trial judge in privately confering with the district attorney in regard to the charge and his failure to impart the same information to counsel for petitioner, constituted a breach of impartiality by the trial judge, and in effect denied petitioner's counsel the opportunity to argue to the jury that petitioner should be convicted, if of anything, murder in the second degree rather than murder in the first degree. Petitioner contends that a part of the due process of law guaranteed every defendant by the Constitution of the United States includes the right to a trial before a fair and impartial judge and the right to an appellate review of any abandonment by the trial judge of his role of fairness and impartiality. The action of the trial judge in petitioner's trial in abandoning his role of fairness and impartiality and imparting knowledge and information to the district attorney that was withheld from counsel for the petitioner certainly affected the conduct of petitioner's trial and prevented petitioner's attorneys from argueing a viable alternative to the imposition of a death

sentence upon petitioner. By striking petitioner's exceptions to this conduct from the record on appeal, the trial judge effectively prevented any criticism of or appeal from his own wrongful and improper conduct and petitioner was denied due process thereby and was again denied due process when the North Carolina Supreme Court refused to consider the matter.

Petitioner further submits that the death sentence as presently imposed by the State of North Carolina is unconstitutional for that the same constitutes cruel and unusual punishment and is unevenly and unfairly imposed and tends to be inflicted upon only defendants of limited financial resources.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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October 8, 1975

Mr. James H. Burwell, Jr.
Attorney at Law
Box 549
Rutherfordton, North Carolina 28139

Dear Mr. Burwell:

Defendant's petition for writ of certiorari to determine propriety of the omission of certain portions of the case on appeal is filed with the following order:

"Denied by order of the Court in Conference this the 7th day of October, 1975, Exum, J. For the Court."

"Defendant allowed up to and including October 27, 1975 to file brief. The Attorney General is allowed up to and including November 17, 1975 to file brief for the State. This October 7, 1975. Branch, J. For the Court."

Very truly yours,

Adrian J. Newton
Clerk of the Supreme Court

AJN:dww

cc: Mr. James E. Magner, Jr., Assistant Attorney General
Mr. M. Leonard Lowe, District Attorney
Mr. Edgar W. Tanner, Clerk of Superior Court, Rutherford County

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1975

STATE OF NORTH CAROLINA)
)
v) No. 54 - From Rutherford
)
JAMES DOUGLAS HARRILL)

Appeal by defendant under G. S. 7A-27(a) from Friday, J. at the 12 May 1975 Session of Rutherford County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first-degree murder of William Cephus Morris on 22 January 1975. The defendant tendered a plea of guilty to second-degree murder, which the State would not accept, and thereupon the defendant pleaded not guilty. The jury found the defendant guilty of first degree murder (felony murder) and the Court sentenced him to death.

The state's evidence, in summary, is as follows: On 21 January 1975 the defendant went to the Union Trust Bank office at Ellenboro, North Carolina, in Rutherford County to change some money. On 22 January 1975 at 9:20 a.m. he entered the same bank wearing a mask and brandishing a gun. He demanded that the bank tellers fill a pillow case with money. While they were complying with his demand, a customer of the bank, William Cephus Morris, was standing nearby. He had just cashed 2 checks. The defendant told Morris to give him what he had in his hand and within a matter of seconds shot Morris, who fell to the floor. These activities were recorded on film, and the film was received into evidence for illustrative purposes. Morris died on 31 January 1975 as the result of a gunshot wound. After receiving the money, including a series of marked $20 bills, the gunman

fled the scene in a green car with a West Virginia license plate. This information was furnished to the law enforcement officials, and at 9:55 a.m. a State Highway Patrolman stopped a green Camaro Chevrolet driven by the defendant at the intersection of Highways 64 and 226 in Burke County, North Carolina. Subsequent to the defendant being removed from the car, a .357 magnum pistol was seen on the floor of the automobile. This was removed and taken into the possession of the Highway Patrolman. Also taken from the car was a pillow case containing $5,862.14, which included $1,000 in marked $20 bills, later identified as having been taken from the bank. Defendant was arrested and given Miranda warnings. His confession was received into evidence after a voir dire hearing had been held and proper findings of fact and conclusions of law had been made by the trial court.

The defendant offered no evidence.

Other pertinent facts and circumstances will be referred to in the opinion.

Attorney General RUFUS L. EDMISTEN by Assistant Attorney General James E. Magner, Jr. for the State.

J. H. BURWELL, JR. and GEORGE R. MORROW for defendant appellant.

COPELAND, Justice.

The defendant first contends that the court erred in denying his motion for continuance and, thus, in violation of the Federal and State Constitutions deprived him of an opportunity fairly to prepare and present his defense. The reasons given for making the motion were that he did not receive a copy of the very complicated autopsy report of the victim until 6 May 1975 and that defendant was not discharged from Dorothea Dix Hospital in Raleigh, North Carolina, until 21 April 1975, after being confined there for the previous month.

Since the motion for continuance was based on a right guaranteed by the Federal and State Constitutions, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v Smathers, 287 N.C. 226, 214 S.E. 2d 112 (1975). The defendant

relies heavily on Smathers, but the facts are obviously distinguishable. In Smathers the defendant had reasonable grounds to believe that he was only charged with a misdemeanor until the day of the trial when he found out he was charged with a felony which could lead to imprisonment for life. We do not have that type of situation here. The defendant was properly charged with 1st degree murder in a warrant and later by bill of indictment. A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v Robinson, 283 N.C. 71, 194 S.E. 2d 811 (1973); State v Phillip, 261 N.C. 263, 134 S.E. 2d 336 (1964).

A careful examination of the record indicates that there was neither error nor prejudicial error. Counsel for the defendant was appointed in February, 1975, shortly after the arrest of the defendant for murder on 31 January 1975. The defendant was indicted on 10 March 1975, his case was initially called for trial on 17 March 1975, and by his own motion an order was obtained delaying the trial and committing the defendant to Dorothea Dix from 21 March to 21 April 1975 to determine his mental competency to stand trial. The record indicates that the court session began 12 May 1975, this case was called and this motion heard on 13 May 1975, and the jury was empaneled on 14 May 1975. Thus, the defendant had access to the autopsy report for seven days prior to the time this motion was heard, and counsel had approximately three months to prepare for trial and consult with the defendant. Although he contends that the autopsy report was too complicated to permit adequate preparation during this period, he failed to put the autopsy report into evidence. Furthermore, the testimony admitted as to the cause of death indicated there was ample time for preparation. Certainly, under these circumstances there was no error shown.

The defendant's contention that the denial of the continuance was erroneous for the reason that the trial judge did not exercise his discretion in making his ruling is without merit. Although

the court was mistaken in its belief that at the time of this trial there was a statutory deadline for making the motion for continuance and that it had not been satisfied, the court's later statements plainly indicated that it would consider the motion under its discretionary power independently of the requirement of the statutory deadline and that it did properly exercise its discretion after hearing the arguments of counsel.

Additionally, the defendant has failed to show that he has been prejudiced by the denial of the continuance. The evidence of the State is overwhelming, and there is no evidentiary support for the defendant's theory that he would have been able to show that the victim was not killed as the result of the gunshot wound if the continuance had been granted.

For the above reasons this assignment of error is without merit and overruled.

The defendant assigns as error the denial of his motion for a change of venue or for a special venire from another county. This motion was based on the ground that the prominence of the victim and the inflammatory publicity from local news media, as well as discussions from church pulpits, would prevent a fair trial.

The defendant's motion is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. State v Blackmon, 280 N.C. 42, 185 S.E. 2d 123 (1971).

The defendant's contention that the denial of his motion was an abuse of discretion for the reason that the trial judge did not properly exercise his discretion in making his ruling is without merit. The record plainly discloses that the judge indicated he would consider the motion under his discretionary power independently of the statutory deadline for making the motion which he mistakenly believed to exist. The judge heard the arguments of counsel and pointed out that on his own motion he had ordered special jurors and that the arguments advanced by the defendant could be taken care of on voir

dire examination of prospective jurors. The accounts carried by the local news media do not appear to have been beyond the bounds of propriety or to have been inflammatory. The prominence of the victim does not seem to have unfairly affected the trial. Since the defendant failed to include in the record the voir dire examination of the jury, the record does not disclose that the defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him, or even that any juror had prior knowledge or opinion as to this case. Under these circumstances, no abuse of discretion has been shown. State v Thompson, 287 N.C. 303, 214 S.E. 2d 742 (1975). This assignment of error is overruled.

Next the defendant complains that the court erred in refusing to allow him to cross-examine Dr. Bass as to the cause or causes of the decedent's death.

"One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses." 1 Stansbury's North Carolina Evidence § 35, at 100 (Brandis Rev. 1973); accord, Barnes v Highway Commission, 250 N.C. 378, 394, 109 S.E. 2d 219, 232 (1959). See also State v Hightower, 187 N.C. 300, 121 S.E. 616 (1924). The appellant has the burden of showing not only error but also prejudicial error. State v Robinson, 280 N.C. 713, 187 S.E. 2d 20 (1972).

The doctor had testified on direct examination that the actual final event that caused the decedent's death was massive hemorrhage due to multiple ulcers of the stomach, referred to as stress ulcers, brought on by the combination of severe trauma and multiple episodes of shock, resulting from a penetration wound of the abdomen apparently caused by gunshot.

On cross-examination the doctor described stress ulcers as usually being a result of "sudden traumatic or sudden onset of injuries." He indicated that the victim did have emphysema at the time, that he had never heard of a case of stress ulcers as the result of emphysema, but that it could happen and nothing was beyond the realm

of possibility.

The record indicates that the defendant then asked a series of questions to determine if the victim had an ulcer prior to sustaining the traumatic injury from the gunshot wound to such an extent that it might have been the cause of decedent's death rather than the ulcers resulting from the gunshot wound. Although numerous objections of the State were sustained, no prejudice has been shown since the defendant failed to have answers to these questions placed in the record and Dr. Bass elsewhere during cross-examination substantially answered the defendant's inquiry. Dr. Bass testified that he had never seen the decedent before this incident and there were no ulcers at the holes where he observed the gunshot wounds when he operated on 22 January 1975, nine days before the death of the deceased. The doctor stated that he was not able to determine whether there were any ulcers before the injuries resulting from the gunshot wounds since he did not examine the stomach other than the holes. He concluded that the man's death resulted from a series of events which were initiated by the gunshot wound. This assignment of error is overruled.

The defendant contends that during the voir dire examination to determine the admissibility of the confession that the defendant purportedly made approximately two hours after the alleged crime, the court erred in sustaining the State's objections to questions asked Dr. James Groce and in striking his opinions. Dr. Groce, who was accepted by the court as an expert in psychiatry, had examined the defendant from 21 March (58 days after the shooting) to 21 April 1975 at Dorothea Dix Hospital.

The record discloses that the court allowed a single motion to strike an expert opinion given by Dr. Groce. Otherwise, no answers of Dr. Groce to questions to which the State's objections had been sustained were placed in the record for purposes of appellate review except insofar as the court later permitted answers to similar questions to be admitted into evidence for purposes of this voir dire examination. Furthermore, the court later during this voir dire examination

received into evidence substantially the same opinion that was stricken. Under these circumstances no prejudicial error has been shown. This assignment of error is overruled.

Next, the defendant complains that the trial court erred in overruling his objection to a question by the State which interrupted the testimony of Dr. Groce while being cross-examined by the State during the same voir dire examination discussed above. The defendant contends the trial judge in this manner refused to allow Dr. Groce to complete and explain his testimony and in violation of G. S. 1-180 failed to maintain an impartial role.

The original question and the omitted portion of the answer were not placed in the record. Dr. Groce had previously made the same statement without adding the limiting conjunction "but" which appeared at the end of the interrupted statement. Additionally, after the interruption, Dr. Groce gave testimony modifying the interrupted statement and, thus, apparently completed his answer to the State's original question. Under these circumstances there is no prejudicial error, and the assignment of error is overruled.

The defendant also contends that during this voir dire examination relative to the purported confession the trial judge failed to maintain an impartial role in violation of G. S. 1-180 by striking part of the testimony of defendant's witness, Millicent Harrill (his sister-in-law), when there was no objection on the part of the State to the testimony stricken.

It appears that the defendant was trying to secure from this witness her opinion of the defendant being on drugs at the time of the purported confession. She testified that he was on drugs on 20 January 1975 at her home. Thereupon, the court concluded that the question had not been asked properly, struck the answer, and directed counsel to ask her again about it, which was done. She then expressed her opinion that the defendant was under the influence of drugs on the 20th of January, as well as at the Rutherford County jail on 22 January 1975, the date of the alleged crime and confession.

The answers which the defendant wished in the record were placed there. Thus, there was no prejudice to the defendant by the court insisting that the question and answer be repeated before allowing them as evidence during this voir dire examination. The assignment of error is overruled.

Next, the defendant contends that the court erred in allowing into evidence the confession of the defendant.

Both the State and the defendant were permitted to offer evidence on the voir dire hearing as to the admissibility of the confession. Proper findings of fact and conclusions of law were made. It is well settled that if these facts are supported by competent evidence they are conclusive and binding on appeal. State v Gray, 268 N.C. 69, 150 S.E. 2d 1 (1966), denied, 386 U.S. 911, 87 S. Ct. 860, 17 L. Ed. 2d 784 (1967).

The assignment of error is overruled.

Next, the defendant contends the court erred in not permitting counsel to argue to the jury his tender of a plea of guilty of second-degree murder. This assignment of error is based upon the following argument of the defendant and ruling of the court:

> "Ladies and gentlemen of the jury, as you heard, the defendant tendered a plea of guilty to second degree murder and the State - -
>
> "MR. LOWE: Objection.
>
> "COURT: Sustained. You may not argue that line. Proceed with your argument."

The record discloses that before the defendant's plea was made, he tendered a plea of guilty to second degree murder, which the State refused to accept, and thereupon he tendered a plea of not guilty. No evidence of the tendered plea of guilty was offered to the jury. In fact, we do not see its relevancy under the circumstances of this case if the plea had been offered into evidence by the defendant. See 1 Stansbury's N. C. Evidence § § 78-81 (Brandis Rev. 1973). "[W]e have held that counsel may not place before

the jury incompetent and prejudicial matters, and may not 'travel outside the record' by injecting into his argument facts of his own knowledge or other facts not included in the evidence." State v Monk, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975).

Furthermore, although our research discloses that the issue has not been decided in North Carolina, in the light of the emergence of plea bargaining as a major aspect in the administration of criminal justice and the importance of insuring the integrity of this procedure, Santobello v New York, 404 U. S. 257, 92 S. Ct 495, 30 L. Ed. 2d 427 (1971), the trend is that any communication relating to legitimate plea bargaining with the district attorney is generally inadmissible as evidence unless the defendant has subsequently entered a plea of guilty which has not been withdrawn. Hineman v State, 292 N.E. 2d 618 (Ind. Ct. of App. 1973); Moulder v State, 289 N. E. 2d 522 (Ind. Ct. of App. 1972); 2 ABA Standards, Pleas of Guilty, § 3.4, at 77 [Approved Draft, March 1968]; see 59 A.L.R. 3d 448-460. See also 2 Stansbury's N. C. Evidence § 180, at 56 and 58 (Brandis Rev. 1973). State v DeBerry, 92 N.C. 300 (1885), is distinguishable from the present case because there the defendant bargained with the prosecuting witness in an attempt to have the charge dropped.

Under these circumstances the court properly sustained the State's objection to defendant's argument. See also Clayton v State, 502 S. W. 2d 757 (Tex. Cr. App. 1973). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury." State v Monk, supra, at 515, 212 S. E. 2d 125, 131 (1975). The assignment of error is overruled.

The defendant argues that the court expressed an opinion in its charge to the jury by erroneously using the terms and phrases "The defendant confesses," "that confession," "confession," "vicious and brutal killing," "vicious and brutal slaying," said terms

Imparting to the jury the court's opinion of the alleged crime.

"G. S. 1-180 requires that the trial judge clarify and explain the law arising on the evidence . . . ." State v Cameron, 284 N.C. 165, 171, 200 S.E. 2d 185, 191 (1973). "A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial. [Citations omitted.]." State v Lampkins, 283 N.C. 520, 523-524, 196 S.E. 2d 697, 699 (1973).

In this case the court was talking about a confession that had been admitted into evidence after a voir dire hearing was held, with the court making proper findings of fact and conclusions of law thereon. All the judge told the jury was that if the jury found that the defendant made the confession, then they would have to consider all the circumstances under which it was made in determining whether it was a truthful confession or not.

With regard to the language "vicious and brutal killing," the court charged the jury as follows:

> "Now, the court also instructs you, ladies and gentlemen, that in passing upon the question of the presence or absence of an actual specific intent to kill and of premeditation and of deliberation, it is proper for you, the jury, to take into consideration evidence tending to show the absence of provocation on the part of the deceased at the time of the killing, evidence tending to show a VICIOUS AND BRUTAL KILLING on the part of the defendant, evidence tending to show all circumstances relating to and surrounding the killing...." (emphasis added)

Then the court went on to charge the jury as follows:

> "Now, among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) Want of provocation on the part of the deceased. (2) The conduct of the defendant before and after the killing. (3) Threats and declarations of the defendant before and during the course of the crime, giving rise to the death of the deceased. (5) The use of grossly excessive force. Premeditation and deliberation, ladies and gentlemen of the jury, may be inferred from a VICIOUS AND BRUTAL SLAYING of a human being." (emphasis added)

These instructions were specifically limited in context to the determination by the jury of whether there was premeditation, deliberation, and a specific intent to kill for purposes of the first

degree murder charge. Since the jury returned a verdict of guilty of felony - murder, which is not dependent on a determination of premeditation, deliberation, and a specific intent to kill, no prejudice is shown by this charge. This is particularly true since the defendant shot a 68 year old bystander with a .357 magnum pistol while attempting to rob a bank and take from the victim the money he had just been handed by a teller. The state's evidence indicated the victim in no way threatened the defendant. The defendant demanded that the victim "give me that." Then "[t]he robber made a jerk for Mr. Morris' hand and Mr. Morris made a slight jerk -- it wasn't a hard jerk, just a slight jerk, and when he did that, he [the defendant] instantly turned that gun to him and shot him before he had time to have a second thought or do anything." The robber "immediately flipped that gun around" pointing it at a teller and demanded that she turn over all the money. This case is clearly distinguishable from State v Buchanan, 287 N.C. 408, 215 S.E. 2d 80 (1975). There was no prejudicial comment by the trial judge in violation of G. S. 1-180.

The assignment of error is overruled.

Next, the defendant contends that the trial court erred in its charge on second-degree murder in that the judge confused the jury when he referred to "intent" in the charge on second-degree murder.

A review of the instruction discloses that it only seeks to explain to the jury the difference between first-degree murder and second-degree murder. In summary, the court told the jury. "Murder in the first degree, then ladies and gentlemen, is murder in the second degree plus these three essential elements: (1) An actual specific intent to kill, and (2) premeditation and (3) deliberation."

Since the jury returned a verdict of guilty of felony-murder, there has clearly been no error.

There is no merit to this assignment and it is overruled.

Next, the defendant contends that the court erred in expressing an opinion during the course of the trial in violation of G.S.

1-130.

The defendant is attempting to rehash a number of assignments of error, most of which have already been discussed in this opinion. The defendant is not specific and attempts to lump together a number of unrelated incidents. These assignments are broadside in nature and are without merit. State v McCaskill, 270 N.C. 788, 154 S.E. 2d 907 (1967). They are overruled.

Finally, the defendant contends that the trial court erred in sentencing the defendant to death.

Our court has consistently rejected this argument. We do not deem it necessary to set forth again the reasoning of these cases. State v Woodson, 287 N.C. 578, 215 S.E. 2d 607 (1975); State v Robbins, 287 N.C. 483, 214 S.E. 2d 756 (1975); State v Vinson, 287 N. C. 326, 215 S.E. 2d 60 (1975); State v Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974); State v Jarrette, 284 N. C. 625, 202 S.E. 2d 721 (1974). The assignment of error is overruled.

We have carefully reviewed the entire record and we find

NO ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term 1976

NO. 75-6686

JAMES DOUGLAS HARRILL,
Petitioner

-vs-

STATE OF NORTH CAROLINA
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DOUGLAS HARRILL,
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-vs-

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ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 186, _____ S.E. 2nd _____ (1976).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USCA 1257(3).

QUESTIONS PRESENTED

I. Was the petitioner denied his constitutional right to trial by due process of law by

reason of the conduct of the trial judge during the trial and in settling the case on appeal.

II. Was the sentence of death imposed upon the petitioner unconstitutional.

STATEMENT OF CASE

The petitioner has filed with this court a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina in denying the defendant's Petition for Certiorari to review the trial court's settling of case on appeal which omitted certain statements desired by the defendant to be included in the case on appeal. The petitioner has also requested this court to review the imposition of the sentence of death imposed upon him under North Carolina General Statute 14-17 for murder in the first degree.

ARGUMENT

I

THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY DUE PROCESS OF LAW BY REASON OF THE CONDUCT OF THE TRIAL JUDGE DURING THE TRIAL AND IN SETTLING THE CASE ON APPEAL.

The State would argue that the trial judge alone has jurisdiction of matters pertaining to settlement of a case on appeal. In *Hoke v. Atlantic Greyhound, Corp.*, 227 NC 374, 42 S.E. 2d 407 (1947) the court said:

> "It is the sole duty of that judge, from whose judgment an appeal is taken, to settle a case on appeal for this Court. The statute so contemplates, and, in the nature of the matter, another judge could not settle it for him. In such case, he alone is suppose to have the information essential to the proper settlement of the case."

By law in North Carolina the trial judge has the power to settle the case on appeal when the opposing sides cannot agree on the makeup of the record on appeal. N.C.G.S. 1-283. The State of North Carolina contends further, that the action of the trial judge when settling the case on appeal is final and will not be reviewed on appeal. *Millsap v. Wilkes*, 14 NC Ap 321, 188 S.E. 2d 663, Cert. denied 281 NC 623, 190 S.E. 2d 466 (1972).

Under the facts in this case, the state and the defendant's attorney could not agree on certain portions of the case on appeal. A hearing was held before the trial judge who made certain rulings excluding certain portions of the case on appeal that the defendant's attorney wished to place in the record. The defendant's attorney after this ruling by the trial court petitioned for certiorari to the North Carolina Supreme Court. The petition for Writ of Certiorari was denied by order of that court dated October 8, 1975.

The defendant contended that the following paragraph should have been inserted in the case on appeal to the North Carolina Supreme Court:

> "That at the close of all the arguments of counsel, defense counsel learned for the first time that the court had stated the previous day in the presence of the District Attorney, the Court Recorder and the Courtroom Clerk that it intended to charge the jury as to murder in the second degree. Defense counsel were not so informed and were permitted to argue the case under the assumption that the court was intending to abide by an earlier decision that the only issue would be first degree murder."

The State argues that nowhere in the transcript of the trial does it appear that the trial judge was not going to charge as to second degree murder. It is not incumbent upon the judge to make such a statement. Even if the trial court had made a statement to the affect that he was going to charge on second degree murder the previous day outside the courtroom, there would be nothing to prevent him from changing his mind upon further consideration.

And finally, the Defendant would suffer no prejudicial harm as the courts charge on Second Degree Murder, as could only have worked to his benifit while the Jury was deliberating.

II

THE DEATH SENTENCE IMPOSED UPON THE PETITIONER WAS NOT UNCONSTITUTIONAL.

The petitioner asserts that the penalty of death is cruel and unusual punishment. He also urges that the procedure through which a death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth amendments.

This court has received briefs and heard oral arguments on the questions raised by the petitioner in the case of *State v. Woodson and Waxton*, No. 75-5491, 1976 Term. Hence, petitioners question has, in essence, been accepted for hearing by the court. Therefore, any decision in this case should be dependent upon the outcome of the *Woodson* case, and the petition to grant certiorari should be denied.

CONCLUSION

It is therefore respectfully submitted that the question concerning the settlement of the case on appeal has been properly determined under the procedures set out in North Carolina without any violation of the defendants rights and that the Petition for Certiorari should be denied on this point. Second, the state contends that in as much as the question of the constitutionality of the death penalty is already before this court that petitioners Petition For Writ of Certiorari should also be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Response on Petitioner by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to his attorney:

Mr. J. H. Burwell, Jr.
Attorney at Law
624 North Main Street
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This the 17th day of May, 1976.

James E. Magner, Jr.
Assistant Attorney General